No. 665

# In the Supreme Court of the United States

OCTOBER TERM, 1960

DAVID D. BECK, *Petitioner,*

vs.

STATE OF WASHINGTON, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

## RESPONDENT'S BRIEF

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## RESPONDENT'S BRIEF

### CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Sec. 25, Washington State Constitution:

"§ 25 PROSECUTION BY INFORMATION. Offenses heretofore required to be prosecuted by indictment may be prosecuted by information, or by indictment, as shall be prescribed by law."

Article I, Sec. 26, Washington State Constitution:

"§ 26 GRAND JURY. No grand jury shall be drawn or summoned in any county, except the superior judge thereof shall so order."

RCW 2.36.070:

"*2.36.070 Qualification of jurors.* No person shall be competent to serve as a juror in the superior courts of the State of Washington unless he be

"(1) an elector and taxpayer of the state,

"(2) a resident of the county in which he is called for service for more than one year preceding such time,

"(3) over twenty-one years of age,

"(4) in full possession of his faculties and of sound mind,

"(5) able to read and write the English language. [1911 c 58 § 1; RRS § 94. Prior: 1909 c 73 § 1.]"

RCW 10.28.010:

"*2.28.010 Challenge to panel.* Challenges to the panel of grand jurors shall be allowed to any person in custody or held to answer for an offense, when the clerk has not drawn from the jury box the requisite number of ballots to constitute a grand jury, or when the drawing was not done in the presence of the proper officers; and such challenges shall be in writing and verified by affidavit and proved to the satisfaction of the court. [1891 c 28 § 11; Code 1881 § 977; 1873 p 220 § 163; 1854 p 110 § 45; RRS § 2025.]"

RCW 10.28.050:

"*10.28.050 Oath of grand jury—Form.* The following oath shall be administered to the grand jury: 'You, as grand jurors for the body of the county of....., do solemnly swear (or affirm) that you will diligently inquire into and true presentment make of all such matters and things as shall come to your knowledge, according to your charge; the counsel of the state, your own counsel and that of your fellows, you shall keep secret; you shall present no person through envy, hatred, or malice; neither will you leave any person unpresented through fear, favor, affection, or reward or the hope thereof; but that you will present things truly as they come to your knowledge, according to the best of your understanding, and according to the laws of this state. So help you God.' [1891 c 2

§ 13; Code 1881 § 981; 1873 p 220 § 167; 1854 p 110 § 49; RRS § 2029.]"

RCW 10.28.070:

"*10.28.070 Prosecuting attorney to attend.* The prosecuting attorney shall attend the grand jury for the purpose of examining witnesses and giving them such advice as they may ask. [181 c. 28 § 14; Code 1881 § 984; 1873 p 221 § 170; 1854 p 110 § 52; RRS § 2032.]"

RCW 10.37.026:

"*10.37.026 Prosecution may be by information.* All public offenses may be prosecuted in the superior courts by information. [1909 c 87 §1; 1891 c 117 § 1; 1890 p 100 § 1; RRS § 2024. Formerly RCW 10.37.010, part.]"

## STATEMENT OF THE CASE

Petitioner's statement of the case being highly argumentative, respondent does not accept it. Respondent, therefore, submits this statement of the case in the nature of a counter-statement.

On May 20, 1957, King County Superior Court Judge Lloyd Shorett convened a grand jury in Seattle, King County, Washington (R. 312). It is undisputed that the grand jury was called as a direct result of the McClellan Committee hearings which commenced on February 26, 1957, and the publicity flowing therefrom. The publicity in regard to the McClellan Committee hearings for the most part concerned alleged misuse of Teamster Union funds by officers of the union (R. 512-565).

Judge Shorett examined the prospective jurors briefly as to their legal qualifications (R. 312-313). Judge Shorett then examined the individual jurors as to their

general backgrounds and particularly as to prior connections with the Teamsters Union, The Retail Clerks or any affiliated union, and as to whether they had ever been an officer in a union. Certain jurors who had present or past union connections were questioned by the court as follows:

"THE COURT: Are you conscious of any bias or prejudice arising out of that membership that would prevent you from being a fair-minded juror?

MR. WALLACE: I don't think so.

THE COURT: Have you ever been an officer of any union?

MR. WALLACE: No.

THE COURT: Is there anything about sitting on this grand jury that might embarrass you at all?

MR. WALLACE: Not at all." (R. 314);

* * *

"THE COURT: Are you conscious of any prejudice arising out of that union service, any bias of any kind?

MR. MOREAU: Yes.

THE COURT: You feel that your jury service might embarrass you?

MR. MOREAU: It wouldn't embarrass me, it might embarrass somebody else. I am prejudiced to this particular case after reading the newspapers and watching television and comments. I form my own opinion." (R. 317);

* * *

"THE COURT: Would service on this grand jury in any way embarrass you?

MR. JOHNSTON: Well, perhaps you misunderstand me. I am presently a member of the Retail Clerks." (R. 318);

"THE COURT: Is there anything about service on this jury that might embarrass you?

MR. MABE: Well, I don't know.

THE COURT: How is that?

MR. MABE: I don't know. I am awful prejudiced on the case is all I can say. I followed it from . . ." (R. 318-319);

* * *

"THE COURT: Are you conscious of any bias, prejudice or sympathy in this case at all?

MR. EYMAN: That is pretty hard to answer.

THE COURT: Do you feel if you were required to sit here as a juror you could do so, analyzing the evidence and doing what is right and fair?

MR. EYMAN: Yes sir." (R. 320).

Mr. Moreau, Mr. Johnston, Mr. Mabe and Mr. Eyman were excused from the jury. Mr. Wallace was retained.

After 17 jurors were selected to constitute the grand jury they were sworn (R. 326). The oath required by statute to be administered to grand jurors is found in RCW 10.28.050. It reads as follows:

"10.28.050 *Oath of grand jury—Form.* The following oath shall be administered to the grand jury: 'You, as grand jurors for the body of the county of....., do solemnly swear (or affirm) that you will diligently inquire into and true presentment make of all such matters and things as shall come to your knowledge, according to your charge; the counsel of the state, your own counsel, and that of your fellows, you shall keep secret; you shall present no person through envy, hatred, or malice; neither will you leave any person unpresented through fear, favor, affection, or reward or the hope thereof; but that you will present things truly

as they come to your knowledge, according to the best of your understanding, and according to the laws of this state. So help you God.' [1891 c 28 § 13; Code 1881 § 981; 1873 p 220 § 167; 1854 p 110 § 49; RRS § 2029]."

Thereafter Judge Shorett gave his charge to the grand jury (R. 326-332). In that charge Judge Shorett told the jury something of the early history of the grand jury and then explained its present day function as follows:

"The grand jury is an investigative body possessed of the power to require the attendance of witnesses and to subpoena books, records and similar documents. Its function is to inquire into the commission of crime in the county. Ordinarily this can be done by the regularly established law enforcement agencies such as the prosecuting attorney, but the prosecuting attorney cannot require the attendance of witnesses or compel them to testify, and he cannot subpoena books and records. As I shall later explain, the matters you have been called to investigate require the exercise of the peculiar powers granted to grand juries." (R. 327).

The judge then explained some of the statutory mechanics of the grand jury and followed that with the explanation promised in the last quoted sentence above.

"We come now to the purpose of this grand jury and the reasons which the judges of this court thought sufficient to justify the expense to the county, and the inconvenience to and sacrifice by you, which this grand jury session will require.

"It seems unnecessary to review the recent testimony before a Senate Investigating Committee except to say that disclosures have been made indi-

cating that officers of the Teamsters Union have, through trick and device, embezzled or stolen hundreds of thousands of dollars of the funds of that union—money which had come to the union from the dues of its members. It has been alleged that many of these transactions, through which the money was siphoned out of the union treasury, occurred in King County. Such crimes, if committed, cannot be punished under Federal law, or under any law other than that of the State of Washington, and prosecution must take place in King County. The necessary criminal charges can only be brought in this county upon indictment by the grand jury or information filed by the prosecuting attorney.

"The president of the Teamsters Union has publicly declared that the money he received from the union was a loan which he has repaid. This presents a question of fact, the truth of which is for you to ascertain.

"You may find that many of the transactions happened more than three years ago; this would raise the question of the statute of limitations, which ordinarily bars a prosecution for larceny after three years. There are some instances, however, where the period is extended. This is a question of law and you should be guided by the advice of the prosecutors on this and similar questions. Your investigation may conceivably result in the adoption of better standards of conduct for union officials.

"Some other inquiries suggested by the Senate investigation are the relationship between the officers of the Teamsters Union and a certain insurance broker; an alleged conspiracy between business men and Teamster officials in fixing prices;

and the influence wielded by Teamster officers through campaign contributions to public officials.

"To completely investigate all of these items may be beyond the energy and endurance of yourselves, the prosecutors and their investigating staff. The financial burden of such a complete investigation may be beyond the resources of King County. I urge you to do all that you can within practical limitations to ascertain the truth or falsity of these charges." (R. 329-330)

Judge Shorett further admonished the grand jurors as follows:

"Now, members of the grand jury, that is all I have to say to you in the way of a formal charge. I think you all realize that your names have been selected right from the jury list which in turn is picked from the voters' registration books. You have a most serious task to perform and I know you realize it is being performed, and is to be performed, by a grand jury picked at random from among the citizens in this community, and thus we hope to keep the law close to the people. It is a tremendous responsibility, and I wish you well in your work." (R. 331)

During the course of the grand jury investigation one Fred Verschueren, Jr., testified twice. The first time was on June 20, 1957, and the second was on July 10, 1957 (R. 349, 379). The first time Verschueren was a witness on June 20, 1957, he was examined almost exclusively and at length as to the purchase and sale of automobiles owned by the Teamsters Union (R. 353-370). Fred Verschueren, Jr., testified that he had worked for the Joint Council of Teamsters since April 15, 1947 (R. 362); that he had been the bookkeeper for

and in complete charge of all of the books of the Joint Council of Teamsters since January of 1955 (R. 351, 353); that he keeps possession of the titles to automobiles owned by the Joint Council (R. 355) and can tell what automobiles are owned by the Joint Council at any particular time by the titles in his possession (R. 356); that automobiles are carried on the union books as auto expense with no depreciation (R. 354); that he can tell how many automobiles have been purchased by the union by cash expenditures and auto expense entries (R. 356); that if a union automobile was traded in on a new purchase it would not show on the union books but the books would just show a lower price for the new purchase (R. 357); that if a union officer obtained title to a union automobile and sold the automobile for cash and gave the cash to Fred Verschueren, Jr., it would show in the union books, but if the cash was not given to Verschueren, it would not show in the books (R. 357); that if there had been such a cash receipt it would show on the union books under miscellaneous receipts with an entry as to what car was sold and to whom it was sold (R. 358); that the books he had with him contained an accurate record of all the receipts and disbursements of the Joint Council from January, 1954 until the present time, and that he could tell from examining those books whether or not there was paid to the Joint Council between January, 1954, and the present date, $1,850 or any similar amount, for the sale of a 1951 Cadillac car (R. 361); that he could also show whether there was any receipt of any money for the sale of any cars during that period (R. 361);

and that he had no recollection at all of a sale of a 1951 Cadillac to one Jack Stratton.

The witness, Fred Verschueren, Jr., was excused for the purpose of examining the books and returned that afternoon (R. 367-368). The witness then testified that there was no record in the Joint Council books of any sale of a car from January, 1954, to the present date nor of the receipt of any amount of money approximating $1,850 (R. 368). He also testified that in his opinion the records he examined were the complete and total records of the Joint Council for that period of time (R. 368).

On July 10, 1957, Fred Verschueren, Jr., on his own volition returned to testify before the grand jury (R. 378-379). At this second appearance at the grand jury investigation the testimony of Fred Verschueren, Jr. consisted of evasion, vacillation, equivocation, vague generalities and loss of memory. On matters in which the witness gave anything resembling definite answers his testimony, despite efforts to arrive at the truth, was largely incredible and full of inconsistencies as illustrated by the following resume of portions of his testimony.

He testified that he came back to clarify his prior testimony; that he had not remembered when he testified previously that petitioner had "turned monies over to me to be held under their proper discretion was realized" and had mentioned something about automobiles; that he didn't recall it until after his prior testimony because it had not come up at that time; that the money was in envelopes and they were sealed and he

was not certain as to the amount (R. 379); that the money was in two envelopes; that the first one was given to him in the fall of 1954 and the second one was given to him some time in 1955; that at some time he had taken the first envelope back to petitioner who had added something to it (R. 380); that it was quite usual for petitioner to give him money in envelopes and petitioner had picked up all other envelopes (R. 381); that the same day he had testified previously he was contacted by petitioner who asked him if he still had the envelopes and he told petitioner that he did; that that was all he was asked by petitioner (R. 381-382); that he is the only one with access to the box where the envelopes are kept; that he does not know if there is any writing on the envelopes; that the last time he looked at them was after petitioner called him (R. 383); that the envelopes were sealed when he got them; that they are unsealed now; that he unsealed them by tearing them open with his finger; that he has never counted the money in its entirety but estimates the amount at $5,000 to $6,000 in denominations of 20's, 50's and 100's; that since petitioner gave him the money to hold "until we can determine its proper discretion" it had not entered his mind (R. 384); that petitioner never told him to apply the money as the price of a car sold by the union but did mention something about automobiles (R. 384-385); that despite the fact that the prior inquiry was directed primarily at automobile transactions he did not remember this unusual transaction and has no explanation for this failure of memory (R. 387).

The witness then went to the vault at the Teamsters

hall and returned with the envelopes which were marked and referred to in the grand jury investigation as exhibits 76 and 77 (R. 388-389). Exhibit 76 had the word "stamps" written on it in unknown handwriting (R. 401). Exhibit 77 had the words "Western Conference or J.C." written on it in pencil in petitioner's handwriting (R. 389). Exhibit 76 contained $3,100 in 20, 50 and 100 dollar bills (R. 451). Exhibit 77 contained $3,500 in 20's, 50's and two 500 dollar bills (R. 456). Exhibit 77 also contained a pencilled note in petitioner's handwriting which read: "Money from car sales. Check amount, if any, owed to Western Conference or International to apply new purchases. D. B." which note was referred to as Exhibit 79 (R. 455).

The witness testified that the note, Exhibit 79, was in the envelope all the time that he had it (R. 452); that it may not have been put in the envelope until petitioner added money to it (R. 453); that the envelope, Exhibit 77, had not been unsealed until petitioner added money to it (R. 467); that the witness had unsealed it prior to the time petitioner added money to (R. 467); that the note had been in the envelope since the first time the witness had unsealed it (R. 470).

As to the two $500 bills in Exhibit 77 the witness testified that he could not say whether the bills were part of the original money given to him or whether he put them there himself (R. 457); that he may have changed a $500 bill for someone over the counter (R. 458); that it is very unusual for him to see a $500 bill and it is not incredible for him to ask for a $500 bill from the bank even though he was going to use the money to cash checks with and he could not cash them with $500 bills

(R. 459); that the bills probably came over the counter or from the bank but he definitely does not remember how he got them (R. 460); that he does not think he would remember if he got a $500 bill to put in there (R. 458); that he thinks he would remember if a $500 bill came over the counter (R. 466).

As to cashing checks out of the funds in the envelopes, Exhibits 76 and 77, the witness testified that he cashed checks quite a few times, maybe fifty times, but he only resealed the envelopes when he reimbursed the envelopes (R. 395); that he cashed checks innumerable times (R. 397); that he cashed so many checks that he can't remember any single person for whom he cashed one (R. 404); that he used more than the total amount in one envelope at one time but not more than the total in both envelopes at any one time (R. 404); that he cashed checks out of these envelopes approximately 8 or 10 times in three years (R. 420, 427); that he has been into each envelope at least once (R. 405); and maybe many more than ten times (R. 406); that when he cashed a check he would unseal the envelope and generally reseal it and later reimburse the envelope (R. 389); and that he would unseal the envelopes by slipping his finger along them and would reseal them without using glue but just by re-licking them (R. 392).

As to the note, Exhibit 79, directing that the amount of money owed to the union be determined, the witness testified that he didn't think the note was directed to him even though delivered to him because he had not been definitely so instructed (R. 470-472); that he had no authority to do as the note directed (R. 479); yet he cashed hundreds of checks out of the money (R.

450) and never mentioned it to petitioner or asked his permission to use the money (R. 431) although he did ask petitioner once or twice what to do with the money (R. 427).

The witness testified that the sequence in which he received the money was that petitioner had given him one envelope and later added money to it and still later gave him the second envelope (R. 408); that petitioner gave him the first envelope and later gave him the second envelope and still later added money to the second envelope (R. 434); that petitioner gave him the first envelope and later gave him the second envelope and still later added money to the first envelope and never added money to the second envelope (R. 477-478).

The witness testified that petitioner had given him other envelopes to hold "innumerable times" (R. 395) and that petitioner had given him other envelopes to hold not over three or four times in the last three years (R. 434).

The witness testified that he is certain the exact amount of money originally contained in the envelopes is the same as at present (R. 479) although he cashed hundreds of checks out of the money (R. 450) and might have replaced the money in the wrong envelope (R. 450) and never counted the money in the envelopes (R. 384) and had not previously known how much was in there (R. 379).

The witness testified that he cashed checks innumerable times out of the envelopes (R. 397) and put in the check or an IOU so the money could be replaced (R. 389) and talked to petitioner on two different occasions

about the money (R. 431) and had been told originally that the money had something to do with automobiles (R. 379) and had read the note in one envelope designating the money as "money from car sales" (R. 453, 455, 470-471) and had last cashed a check out of the envelopes just prior to his original testimony before the grand jury (R. 409) and despite these facts could not remember these monies when questioned at length in regard to car sales in his original testimony (R. 439-440).

The witness found out right after his first testimony on June 20, 1957, that he had forgotten to tell about the money in the union safe (R. 397, 442). He knew it was definitely important testimony (R. 447) yet it was three weeks before he got around to notifying the grand jury of it on July 10, 1957 (R. 378). The way that the witness learned of his oversight was that he ran into petitioner as he was leaving a gas station (R. 443) and petitioner called him over to his car (R. 444). The total conversation consisted of a question by petitioner as to whether the witness still had the money in the vault and the witness answered that he did (R. 445). The witness did not tell petitioner that the grand jury had not been so informed but the petitioner possibly realized it from the amazed or shocked expression on the witness's face (R. 445). As a result of this, the witness was contacted by one of the petitioner's attorneys, Mr. Wesselhoeft, who wanted to see if the envelopes were in the Teamster vault. The witness showed him that they were. About a week and a half after the witness realized he had forgotten to inform the grand jury of this important information he called an attorney for advice and was ad-

vised to return and testify. About a week and a half after that the witness finally returned to the grand jury investigation to so testify (R. 440-449).

The grand jury returned indictments against petitioner and his son on July 12, 1957 (R. 1). Because petitioner was and had been a very prominent national and local figure, this event was naturally front page news. During the approximately five months from the date of the indictment to the date of the trial the newspaper coverage of this event was simply factual reporting of events for the most part initiated by petitioner.

During the period from July 12, 1957, to October 1, 1957, there were only four items relating to the indictment. The first three items appeared on July 12 reporting the indictment itself (R. 590-593). The other item appeared September 17 reporting a pre-trial maneuver by petitioner (R. 611). The item at (R. 594-595) is an article on petitioner's career relating a typical Horace Greeley story about the poor boy who works hard and makes good and reaps great benefits for his union. The items at (R. 596, 602, 608-609) relate to petitioner's income tax troubles. The items at (R. 597-601, 605-607) are magazine articles on petitioner's career that are not particularly flattering, but neither are they inflammatory. The item at (R. 603-604) relates to the Senate probe in Washington, D.C., and is unrelated to the grand larceny charge. The items at (R. 610, 612, 613, 616, 618, 619, 620) relate to the dispute between the Teamsters and the AFL-CIO. The items at (R. 615, 617 and 641) were, respectively, a Senator Goldwater interview condemning union corruption in general, a Steelworkers Union official complaining

about Senate hearings, and a Chicago union official condemning both petitioner and Senator McClellan. The items at (R. 621-635 and 638-639) are items from newspapers outside of King County which have negligible circulation in King County. The items at (R. 614, 636, 637, 640 and 642) all relate to the then pending Teamster convention and election. There is nothing in the above factual newspaper reporting nor in the nature of the charge itself which could inflame a community so as to prevent a fair trial.

For the period October 5, 1957, to November 6, 1957, the record contains no news items that related to the grand larceny case against petitioner. The items found at (R. 681 and 692) relate to an internal civil dispute of the Teamsters. The items found at (R. 682, 683, 684-685, 686-689 and 690) are articles about James Hoffa. The items found at (R. 695-696, 698, 699, 701, 702, 705, 708, 709, 710 and 711) are articles about Nathan Shefferman. The item at (R. 703) reports that the AFL-CIO President George Meany deplores union corruption. The items at (R. 697 and 700) report that petitioner's travel expenses to Dan Tobin's funeral were paid by Sears. The item at (R. 691) is a report that a radio ad salesman got a big kick out of seeing petitioner in Las Vegas. The item at (R. 704) reports petitioner's news conference about his dispute with the AFL-CIO. The item at (R. 706) reports that a New York labor official worked for petitioner. The item at (R. 707) reports that an ex-Eisenhower aide had worked for petitioner.

During the period from November 2, 1957, to November 23, 1957, newspaper coverage was confined to

factual reports of events as they occurred. The item appearing at (R. 733) related to the Teamsters' dispute with the AFL-CIO. The item at (R. 743) related to Teamsters unions in Iowa and Minnesota. The items appearing at (R. 734 through 742 and 744) were reports of pre-trial maneuvers by petitioner. The items appearing at (R. 745 through 794) with the exception of those at (R. 774, 776, and 787-788) were factual reports of those things the newspapers considered highlights of the trial of petitioner's son. The items at (R. 774, 776, 787-788) were reports of petitioner's announcements in regard to his management of union affairs.

Newspaper coverage from November 24, 1957, through December 2, 1957, again was factual reporting of news events as they happened. The items at (R. 799, 800, 804, and 806) reported petitioner's news conferences on his membership campaign for the Teamsters. The items at (R. 801, 805, and 807) were related to pretrial maneuvers by petitioner. The item at (R. 802) related to petitioner's federal tax case. The item at (R. 803) reported the petitioner's son moved for a new trial. The item at (R. 808) related to Teamster elections. The item at (R. 809) was a small article in *Time* magazine reporting the conviction of petitioner's son. The item at (R. 810) reported the program of a Teamster Vice-President to provide defense funds for union officials.

The above news coverage during the approximately 5-month period from the date of the petitioner's indictment to the date of his trial was simply factual reports of new events as they occurred containing no inflammatory matter.

The instant case proceeded to trial in Department 17 of the Superior Court of King County on December 2, 1957, before the Honorable George H. Revelle (R. 30).

Petitioner at the beginning of trial challenged the jury panel (R. 31); renewed his motion for continuance (R. 33), asking for a continuance "long enough to permit the defendant (petitioner) to attend . . . proceedings in Washington, D.C." [a civil action in the Circuit Court of Appeals] (R. 34); and an alternative motion for a one-day continuance to permit proceedings in Federal court to restrain the King County trial so that petitioner might attend the civil trial in Washington, D.C. (R. 35). Petitioner renewed his motion for continuance on the grounds of prejudice and adverse publicity (R. 36). Petitioner, at the same time, made a motion to excuse all prospective jurors who were summoned as prospective jurors in an earlier case of *State v. Dave Beck, Jr.* (R. 38) or who were excused by either side in the earlier case (R. 38).

The court denied the challenge to the jury panel (R. 40); granted the motion to excuse jurors called as prospective jurors in the earlier case (R. 40); and denied the motion for continuance (R. 40), granting any necessary time to argue injunction proceedings in Federal court (R. 40).

The court excused all prospective jurors who were in the courtroom at any time during the case of *State v. Dave Beck, Jr.* (R. 46-47). Prospective jurors were called (R. 47), and questioned by the court (R. 49-65). Two jurors were excused by the court because they had opinions as to the guilt or innocence of the defendant

[petitioner] (R. 58, 187); one because of prejudice (R. 61); one because of "labor relations" (R. 63) two because of uncertainty of attitude (R. 109, 182); two because of health (R. 112, 120); three because of preconceived opinions (R. 169, 216, 255); one because of a family emergency (R. 183); and one because of an expressed negative frame of mind (R. 186). Other jurors were excused by the court (R. 56, 59, 60, 62, 277).

The court advised the jurors that they would not be allowed to separate when finally selected (R. 54-55); and that they would be able to communicate with their families in connection with articles of personal comfort (R. 54, 268).

General questions were asked the jurors by counsel (R. 65-67). Both counsel specifically questioned prospective jurors at great length (R. 67-307).

One juror was challenged by petitioner for an expressed "general prejudice" against petitioner (R. 71-73); another for doubts as to his attitude (R. 195-196); another for preconceived beliefs as to petitioner's guilt (R. 241). Each was excused by the court.

One prospective juror, Raymond J. Kraatz, was questioned at length by petitioner on his relationship with labor unions and his attitude (R. 95-102) and was passed for cause (R. 102). He was subsequently challenged peremptorily by petitioner (R. 175), on his first peremptory challenge (R. 175). Petitioner exercised six peremptory challenges (R. 175, 212, 253, 262, 274 and 288).

The respondent exercised four peremptory challenges (R. 165, 206, 225, 282).

After a jury of twelve persons was selected and sworn (R. 295), an alternate juror was selected (R. 307), one prospective alternate having been excused by the court (R. 298) and one having been excused by the respondent (R. 302).

The case then proceeded to trial on the merits.

The jury thereafter returned its verdict of guilty on December 14, 1957 (R. 27), and on February 20, 1958, judgment and sentence was entered against petitioner (R. 27-28).

## SUMMARY OF ARGUMENT

Petitioner received a fair trial before an impartial jury in strict compliance with the standards of due process of law.

To support his complaint that he was denied a fair trial, he relies primarily on news coverage of the event. To be sure, prior to his indictment, he was subject to much derogatory publicity emanating from the Senate hearings in the early part of 1957. However, during the five months from the indictment in July to his trial in December, 1957, the news coverage was in no way prejudicial. The news coverage exhibited in the record does not even show an opportunity for prejudice sufficient to prevent a fair trial, much less show it as a demonstrable reality as required by *U.S. v. Handy,* 351 U.S. 454. The exhibits of news coverage in the record concerning the grand larceny charge against petitioner during that five-month period mostly relate to pre-trial maneuvers by petitioner. A large percentage of the other news items about the petitioner relate to his news conferences and activities in the conduct of union af-

fairs. All of this news coverage was limited to factual reporting of the news events. Also in the record is a compilation of news coverage of the trial of petitioner's son in a companion case occurring in November, 1957. This news coverage also was limited to factual reports of what news reporters considered the highlights of that trial. There was no attempt by the newspapers to inflame the public against petitioner nor to try his case in the public print.

The impanelment of the trial jury was conducted in a manner well calculated to secure an absolutely fair and impartial jury. The trial judge, in preliminary examinations of jurors on *voir dire,* emphasized and re-emphasized the standards for such a body as set out in *Irvin v. Dowd,* — U.S. —, 6 L.ed.(2d) 751 (1951). Counsel for both sides examined the jurors extensively to determine possible bias. Of the 12 jurors finally selected to try the case, none was challenged by petitioner. An apt description of this stage of the proceedings is as follows:

> "The appellant tries to apply the *ex post facto* test of the number on the jury panel who admitted prejudice. Appellant fails to make clear that all such prospective jurors were excused, and that thirteen jurors were selected and accepted by both sides within a very reasonable time. All of the fifty-five people who were examined on *voir dire* as prospective jurors had, of course, heard of the case either through television, radio, or the newspapers, but only nineteen were excused for prejudice." (R. 839-840)

The selection of the trial jury complied not only with

the standards set out in *Irvin v. Dowd, supra,* but also with the strictest application of standards of fair play.

The question of whether grand jurors should be screened for bias during their impanelment is not within the purview of the 14th Amendment of the United States Constitution, but must be determined under the supervisory powers of the appropriate appellate court (*U.S. v. Knowles,* 147 F.Supp. 19 [1957] (D.C. Wash.); cf. *Costello v. U.S.*, 350 U.S. 329). The due process clause does not apply to state action prior to trial except insofar as it bears on the fairness of the trial itself (*Stroble v. California,* 343 U.S. 181). This particularly is true as applies to Washington State grand jury proceedings for the reason that the public prosecutor can commence criminal actions at his discretion by filing an information (Wash. Const. Art. I, Sec. 25; RCW 10.37.026). See also *Paterno v. Lyons,* 334 U.S. 314.

Assuming the due process clause requires unbiased grand jurors in state proceedings, the record here does not show that it existed. Prior to indictment, there was considerable derogatory publicity about petitioner arising from Senate hearings. This, however, can do no more than show an opportunity for bias. At the impanelment of the grand jury, the trial judge questioned each of them briefly as to their general background. Those jurors whose background indicated to the trial judge that they may have some opinion on the matter were questioned as to possible bias. As a result of this, three prospective jurors were excused. Hence, it appears the trial judge did take some steps to secure an impartial grand jury, and in his opinion, based on

personal observation, the jurors selected were impartial. In addition, the jurors were instructed that they were going to determine the truth or *falsity* of the matters they investigated, and were sworn to:

> "... present no person through any envy, hatred, or malice; neither will you leave any person unpresented through fear, favor, affection, or reward or the hope thereof; but that you will present things truly as they come to your knowledge, according to the best of your understanding, and according to the laws of this state ..." (RCW 10.28.050)

Neither did the manner in which the witness Verschueren was examined violate the due process clause. The questioning complained of occurred during the second appearance of the witness before the grand jury. That appearance was on his own initiative and his testimony was apparently falsified; hence, the questioner had a duty to question him harshly in an attempt to elicit the truth. Further, the witness was not induced to change his testimony.

The fact that the grand jury had probable cause to indict petitioner is shown by the fact that conviction was obtained on the basis of the evidence adduced at the grand jury hearing; hence, it cannot be said indictment was procured through passion and prejudice.

## ARGUMENT

### Petitioner Received a Fair Trial Before an Impartial Jury in Strict Compliance with the Standards of Due Process of Law.

Petitioner contends the community feeling in King County, Washington, was such that it was impossible to obtain a fair and impartial jury for his trial. The

proper remedy in such a case is either a continuance or a change of venue. Petitioner sought to avail himself of those remedies as indicated in Petitioner's Brief, page 27. On each of those five occasions, the various judges who ruled upon the motions [Judge Hugh Todd (R. 9); Judge Malcolm Douglas (R. 8, 22, and 26); Judge George H. Revelle (R. 40)], by their denial of the motions found that such alleged community feeling did not exist.

Petitioner now has the burden of proving his contention as explained in the following language from *United States v. Handy,* 351 U.S. 454, 462, 76 S.Ct. 965, 100 L.ed. 1331, 1956:

> "While this Court stands ready to correct violations of constitutional rights, it also holds that 'it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.' *Adams v. United States,* 317 U.S. 269, 281, 87 L.ed. 268, 276, 63 S.Ct. 236, 143 A.L.R. 435. See also *Buchalter v. New York,* 319 U.S. 427, 431, 87 L.ed. 1492, 1496, 63 S.Ct. 1129; *Stroble v. California,* 343 U.S. 181, 198, 96 L.ed. 872, 885, 72 S.Ct. 599. Justice Holmes, speaking for a unanimous Court in *Holt v. United States,* 218 U.S. 245, 251, 54 L.ed. 1021, 1029, 31 S.Ct. 2, 20 Ann. Cas. 1138, cautioned that 'If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day.' "

The tests to be applied to determine whether petitioner has sustained his burden are exhaustively treated

in *Irvin v. Dowd*, — U.S. —, 81 S.Ct. —, 6 L.ed.(2d) 751, as follows:

"In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. *Re Oliver*, 333 U.S. 257, 92 L.ed. 682, 68 S.Ct. 499; *Tumey* v. *Ohio*, 273 U.S. 510, 71 L.ed. 749, 47 S.Ct. 437, 50 A.L.R. 1243. 'A fair trial in a fair tribunal is a basic requirement of due process.' *Re Murchison*, 349 U.S. 133, 136, 99 L.ed. 942, 946, 75 S.Ct. 623."

* * *

"It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. *Spies v. Illinois*, 123 U.S. 131, 31 L.ed. 80, 8 S.Ct. 21, 22; *Holt v. United States*, 218 U.S. 245, 54 L.ed. 1021, 31 S.Ct. 2, 20 Ann. Cas. 1138; *Reynolds* v. *United States* (U.S.), *supra*.

"The adoption of such a rule, however, 'cannot foreclose inquiry as to whether, in a given case, the application of that rule works a deprivation of the

prisoner's life or liberty without due process of law.' *Lisenba v. California,* 314 U.S. 219, 236, 86 L.ed. 166, 180, 62 S.Ct. 280. As stated in Reynolds, the test is 'whether the nature and strength of the opinion formed are such as in law necessarily . . . raise the presumption of partiality. The question thus presented is one of mixed law and fact . . .' At p. 156. 'The affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside. . . . If a positive and decided opinion had been formed, he would have been incompetent even though it had not been expressed.' At p. 157. As was stated in *Brown v. Allen,* 344 U.S. 443, 507, 97 L.ed. 469, 515, 73 S.Ct. 397."

* * *

"The rule was established in Reynolds that '[t]he finding of the trial court upon that issue [the force of a prospective juror's opinion] ought not be set aside by a reviewing court, unless the error is manifest.' 98 U.S. at 156. In later cases this Court revisited Reynolds, citing it in each instance for the proposition that findings of impartiality should be set aside only where prejudice is 'manifest.' *Holt v. United States,* 218 U.S. 245, 54 L.ed. 1021, 31 S.Ct. 2, 20 Ann. Cas. 1138, *supra; Spies v. Illinois,* 123 U.S. 131, 31 L.ed. 80, 8 S.Ct. 21, 22, *supra; Hopt v. Utah,* 120 U.S. 430, 30 L.ed. 708, 7 S.Ct. 614."

* * *

". . . as Chief Justice Hughes observed in *United States v. Wood,* 299 U.S. 123, 145, 146, 81 L.ed. 78, 87-89, 57 S.Ct. 177: 'Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular

tests and procedure is not chained to any ancient and artificial formula.' "

The record in the instant case completely negates the contention that the jurors were prejudiced by newspaper coverage or that they were anything but fair and impartial.

During the approximately five months from the date of the indictment on July 12, 1957, to the date of the trial on December 2, 1957, newspaper coverage consisted solely of factual reports of news events as they occurred. (Petitioner describes this news coverage as a "frenzied clamor" [P. Br. 69], and as "denunciation . . . of almost unbelievable intensity" [P. Br. 72]. If this is so, there must be no words to describe the news coverage in *Irvin v. Dowd, supra,* and *Stroble v. California,* 343 U.S. 181.)

Petitioner states that it is ". . . difficult, at a distance of four years, to reconstruct a transitory period of public furor or hysteria through exhibits and documents . . ." (P. Br. 39).

It is, perhaps, much more difficult to place a compilation of newspaper exhibits such as those in the record in the instant case in the proper setting in which they were disseminated to the general public. The news coverage during the 143-day interval between the indictment and the trial is compiled by petitioner at (R. 590-810). If we exclude from consideration those exhibits from newspapers outside of King County which have negligible circulation in King County, the compilation constitutes 191 pages in the record. Each of the pages represents only a small part of a regular

newspaper page. Many of the items are from inside pages of newspapers. Assigning the nominal average of 35 pages to a newspaper for each day of publication, we have approximately 5,000 pages of news print for each newspaper during the five months in question. There are two newspapers of general circulation in Seattle, King County, Washington. The two newspapers are of roughly the same size and circulation. Hence, we have approximately 10,000 pages of news print over a five-month period from which to glean the articles comprising 191 pages in the record. In addition to that, it must be realized that a large percentage of the articles in those 191 pages simply do not relate to the instant case and only indirectly relate to the petitioner. Also, much of the pre-trial news coverage was caused by petitioner himself in his various pre-trial maneuvers, and much was caused by petitioner's activities and news conferences in regard to regular union business. This is not in any way to be construed as criticism. Certainly, petitioner's counsel had not only a right but a duty to make such maneuvers as he deemed necessary and petitioner's business life cannot be expected to stand still because of his pending criminal trial. The fact remains, however, that petitioner is and was a very prominent national and local figure and almost anything he does is news. Fortunately, local newspaper coverage consisted entirely of objective reporting of news events without editorializing or attempting to try petitioner's case in the public print. Clearly, the news coverage in the instant case does not show a community atmosphere of prejudice as a demonstrable re-

ality. It does not even show an opportunity for community prejudice sufficient to prevent a fair trial.

In each of the instances cited at (Petitioner's Brief 27) when petitioner raised this question, the various trial judges who ruled thereon were in daily contact with the news coverage in issue and able to observe the community atmosphere as it then existed. Each of them found by their denial of the motions that the alleged community prejudice against petitioner did not exist. Clearly, this is not "manifest" error under this record. The four judges of the Washington Supreme Court who voted for affirmance also found that the alleged community prejudice at the time of trial did not exist, and there is no dispute whatsoever indicated by that court on this point. 56 Wn.(2d) 474, 349 P.(2d) 387 (R. 827).

Further, an examination of the *voir dire* examination of the trial jury conclusively shows that they were fair and impartial. The trial judge and counsel for each side diligently sought to secure fair and impartial jurors and were successful in their efforts (R. 46-307). The trial judge, perhaps anticipating *Irvin v. Dowd, supra,* emphasized and reemphasized the letter and spirit of the principles therein set out as follows:

> "So the test is not whether you have read about it, heard about it, or seen or heard something about it through some media of communication, the test is whether if you were drawn on the jury you would be able to enter upon the trial with an open mind and disregard what you have read, decide the issues in this particular case entirely and purely upon the evidence received at the trial and the law as given to you by the instructions of the Court.

And I know you know, having served on other juries, that the instructions of the Court are the law regardless of what your personal opinion of the law may be or should be.

"To put the same thing in another way, and I am not now asking you a question to answer yet but I want you to keep this factor in mind, the problem of this question of reading, hearing, and seeing as a member of the public might be put this way. Do you now have an opinion or an impression as to the guilt or innocence of the accused which would require evidence to remove from your mind? If you do have, it is not fair for you to sit upon this jury and it would be a violation of the spirit and letter of the Constitution and laws of this State and of the United States. Neither side in this case should have the burden of having to remove from your minds preconceived opinions or a biased opinion already formed." (R. 52-53)

* * *

"The test in this matter is not whether you have read or heard or seen something about the alleged occurrence in some of those media I have mentioned, newspapers, radio or TV, but whether if you were drawn on the jury you are able to enter upon the trial with an open mind and disregard that that you have read, heard or seen in that nature and decide the issue here entirely and purely upon the evidence received at this trial and the instructions of the Court as to the law." (R. 180-181)

* * *

"It is presumed that when a juror has been selected and accepted by each side that the jurors will keep their minds open until the case is finally submitted to them and it is presumed that the

jurors will accept the instructions of the Court as to the law, regardless of the fact and whether the juror may or may not agree with the law. The juror is required to accept the law as expressed by the Court as being the law and applying it. The juror must base his decision therefor upon the law as declared by the Court and the facts garnered from the evidence submitted in the case in this Court, and base his decision upon this law and the facts uninfluenced by any other consideration." (R. 265-266)

* * *

"The test, therefore, is not whether you have read or heard or seen something about it in that nature but whether if drawn on the jury, you are able to enter upon the trial with an open mind and disregard what you have read or heard or seen on T.V. and decide the issue here entirely and purely upon the evidence received at the trial and the instructions of the Court as to the law. Or, to put the idea another way, it would be done by asking the question, 'Do you now have an opinion or impression as to the guilt or innocence of the accused which would require evidence to remove from your mind?'

"If you do have such an opinion or impression, neither side should have the burden of having to remove from your minds any preconceived opinion or a biased opinion previously formed." (R. 267)

Each of the 12 jurors finally selected entered the case with an open mind. Examination of the record on *voir dire* reveals that each of the jurors examined honestly and conscientiously answered the questions put to them by counsel. Petitioner did not interpose a chal-

lenge for cause to any of the jurors finally selected to try the case. As pointed out in the opinion below:

> "The appellant tries to apply the *ex post facto* test of the number on the jury who admitted prejudice. Appellant fails to make clear that all such prospective jurors were excused, and that thirteen jurors were selected and accepted by both sides within a very reasonable time. All of the fifty-five people who were examined on *voir dire* as prospective jurors had, of course, heard of the case either through television, radio, or the newspapers, but only nineteen were excused for prejudice." 56 Wn.(2d) 474, 475, 349 P.(2d) 387 (R. 828).

In his brief (at pages 30-32), petitioner complains about certain evidence obtained through the grand jury proceedings. Respondent fails to understand petitioner's position in that regard. It has never been claimed that such evidence was illegally obtained or subject to suppression for any reason. It is particularly difficult to understand petitioner's complaint in view of the fact that he concedes at pages 68 and 95-96 of his brief (and tacitly admitted in a pre-trial proceeding before Judge Lloyd Shorett, R. 824), that all of the alleged errors in regard to the grand jury proceedings would be cured if the prosecuting attorney elected to dismiss the indictment and proceed by information. Surely, the evidence would be equally available in that event.

In petitioner's brief (pages 32-33, 71-72), it is claimed that respondent in final argument deliberately sought to induce the jury to consider in their deliberations the publicity of the case, the grand jury proceedings, and the failure of petitioner, when he testified, to cover the issue in the case. A reading of the excerpts

from the final argument (reproduced at R. 307-311) will reveal that this is grossly misleading. The state attorney sought to prevent counsel for petitioner from inviting the jury's attention to these matters as follows:

> "MR. REGAL: Your Honor, I object to Counsel's argument. He has been outside the record for quite a few minutes. I ask that Counsel be advised to talk about the evidence in the case and not about all of these extraneous matters not before the jury.
>
> "MR. BURDELL: I think, if the Court please, there was evidence in this case which warrants a discussion of the consideration of prior testimony." (R. 309)

and, in rebuttal argument, the state attorney admonished the jury:

> "You are not to be influenced at all by any sympathy or prejudice. Nothing at all can be considered by you except the evidence from this witness stand." (R. 311)

It is clear from the record that petitioner had notice and opportunity to be heard on the merits before a legally constituted tribunal in strict compliance with the requirements of due process of law.

**The 14th Amendment to the United States Constitution Does Not Impose upon the United States Supreme Court the Duty of Supervising State Grand Jury Proceedings.**

It is not clear whether federal grand juries must be unbiased nor whether *voir dire* examination must be conducted in that regard.

In *U.S. v. Knowles*, 147 F.Supp. 19, 20-21 (1957, D.C. Wash.), the district court said:

> "Challenges for bias, or for any cause other than

lack of legal qualifications, are unknown as concerns grand jurors. No provision is made for peremptory challenges of grand jurors and no such challenges are permitted. Likewise no *voir dire* examination exists in respect to grand jurors. In other words, the status of a member of a grand jury may not be questioned except for lack of legal qualifications."

However, in *Costello v. United States*, 350 U.S. 359, 363, in ruling on a *federal* grand jury proceeding this court said *inter alia*:

> "An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits."

Mr. Justice Burton in his concurring opinion said at p. 364:

> "I assume that this Court would not preclude an examination of grand-jury action to ascertain the existence of bias or prejudice in an indictment."

It is submitted that if this court does undertake such an examination it is an ". . . exercise [of] its power to supervise the administration of justice in federal courts . . ." (*Costello v. United States, supra*, 363).

The Washington State Supreme Court, in the exercise of its supervisory powers over the Washington courts, is in disagreement as to whether the examination of grand jurors in the instant case was sufficient to show they were unbiased or whether such examination is even necessary under state law. 56 Wn.(2d) 474 (R. 827).

Whether there is a right under the United States

Constitution to an unbiased Federal grand jury is immaterial here. That is a matter to be determined either by application of the 5th Amendment of the United States Constitution or by exercise of the supervisory powers of this court over the lesser federal courts. If there is a right under the United States Constitution to an unbiased grand jury in state proceedings, it must flow from the due process clause of the Fourteenth Amendment. The requirements of due process are set out in *Frank v. Mangum,* 237 U.S. 309, 326, as follows:

> "As to the 'due process of law' that is required by the 14th Amendment, it is perfectly well settled that a criminal prosecution in the courts of a state, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the state, so long as it includes notice and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is 'due process' in the constitutional sense. [Citations follow]"

The application of the due process clause to pre-trial events is explained in *Stroble v. California,* 343 U.S. 181, 197, as follows:

> "When this Court is asked to reverse a state court conviction as wanting in due process, illegal acts of state officials prior to trial are relevant only as they bear on petitioner's contention that he has been deprived of a fair trial, either through the use of a coerced confession or otherwise. *Lisenba v. California,* [314 U.S. 219], at 234, 235, 240; *Lyons v. Oklahoma,* [322 U.S. 596], at 597; *Gallego v. Nebraska,* 342 U.S. 55, 59, 65 (1951."

Applying the above principles to the instant case, it is apparent that the grand jury proceedings were in no way prejudicial to any Federal Constitutional right of the petitioner.

The cases cited by petitioner do not support a contrary contention. At page 40 of his brief, petitioner cites *Cassell v. Texas,* 339 U.S. 282; *Hernandez v. Texas,* 347 U.S. 475; and *State v. Pierre,* 306 U.S. 354. These cases stand for the following proposition. State action which discriminates against a person because of his race violates the 14th Amendment to the Constitution because it denies that person the equal protection of the law. The systematic inclusion or exclusion of persons from grand jury service because of race is such state action and, hence, unconstitutional as to the members of the race discriminated against. A grand jury so impaneled is, therefore, unconstitutional as to members of the race discriminated against, and any action they take against such a person is also unconstitutional *ab initio.*

Re *William Oliver,* 333 U.S. 257 (P. Br. 40) held that a summary conviction of a witness in a secret "one-man grand jury" proceedings denied the witness due process of law for the reason that he did not have notice and an opportunity to defend in a public trial.

Petitioner cites *Hoffman v. United States,* 341 U.S. 479 (P. Br. 40) to support the contention that grand jurors are required to be fair and impartial. In that case, a witness refused to answer questions in a federal grand jury proceeding. A federal court committed him for contempt for refusing to obey its order to answer. It was held that the witness's refusal to answer was rea-

sonable under the 5th Amendment and, hence, he was entitled to remain silent. In the course of that opinion, the court cited *Hale v. Henkel*, 201 U.S. 43, as an admonition not to abuse the investigatory power of the grand jury (quoted at P. Br. 41). That quotation does not stand for the proposition that the Grand Jury today stands between the *public* prosecutor and the accused. That quotation in context reads as follows:

> "Under the ancient English system, criminal prosecutions were instituted at the suit of private prosecutors, to which the King lent his name in the interest of the public peace and good order of society. In such cases the usual practice was to prepare the proposed indictment and lay it before the grand jury for their consideration. There was much propriety in this, as the most valuable function of the grand jury was not only to examine into the commission of crimes, but to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will."

The above language specifically limits that rule to complaints brought by private citizens and clearly does not apply to the public prosecutor in the State of Washington who, at his discretion, may proceed by information. Washington Constitution, Article I, Section 25, RCW 10.37.026. Indeed in the State of Washington the grand jury *cannot* stand between the public prosecutor and the accused.

Petitioner contends that the state's available alternative of accusing by information is no answer to his complaint against the grand jury proceedings (P. Br.

67). Petitioner concedes that the alleged errors in the grand jury proceedings would be cured if the state had used the alternative (P. Br. 68, 95-96). This also is recognized by the State Court (R. 829, 883, and 824). That the due process clause does not contemplate that this court shall be a supervisory agency for such accusatory procedure in state courts is demonstrated by the decision in *Paterno v. Lyons*, 334 U.S. 314, 92 L.ed. 1409. In that case, the accused was indicted by a New York grand jury for receiving stolen property and was subsequently allowed to plead guilty to the lesser, but not included, offense of Attempted Grand Larceny Second Degree. The accused sought to have the judgment set aside on the ground that he had not been indicted on the offense. The New York Constitution provides that a person cannot be prosecuted for such a crime unless on an indictment of a grand jury. In ruling on this question at pages 319-320, the court said:

> "Petitioner further challenges the judgment as a denial of due process upon the ground that the indictment charged him with one offense and that the judgment was based on a plea of guilty to an entirely separate offense. This challenge again basically rests on the allegation that under New York law an indictment for receiving stolen property does not necessarily include a charge of an attempt to steal the property. Petitioner's motion to vacate on such a federal constitutional ground appears to be an available procedure under New York law, and the courts below so assumed. Determination of this federal due process question does not depend upon whether as a matter of New York law the Erie County judge erred in permitting petitioner to plead guilty. The question turns rather upon

whether the petitioner under the circumstances here disclosed was given reasonable notice and information of the specific charge against him and a fair hearing in open court. *Re Oliver*, 333 U.S. 257, 273, 278, *ante* 682, 694, 696, 68 S.Ct. 499; *Cole v. Arkansas*, 333 U.S. 196, 201, *ante*, 644, 647, 68 S.Ct. 514. We agree with the New York courts that this petitioner had such notice and information. The fairness of the hearing afforded petitioner is not challenged."

This principle is also demonstrated in *Frisbie v. Collins*, 342 U.S. 519, 72 S.Ct. 509, 96 L.ed. 541, wherein it was held that securing the presence in court of a criminal defendant by kidnapping him does not invalidate the trial on the merits. This principle is again demonstrated by the following language from *Stroble v. California*, 343 U.S. 181, 197:

"When this Court is asked to reverse a state court conviction as wanting in due process, illegal acts of state officials prior to trial are relevant only as they bear on petitioner's contention that he has been deprived of a fair trial, either through the use of a coerced confession or otherwise. *Lisenba v. California*, [314 U.S. 219], at 234, 235, 240; *Lyons v. Oklahoma*, [322 U.S. 596], at 597; *Gallego v. Nebraska*, 342 U.S. 55, 59, 65 (1951)." (*Stroble v. California*, 343 U.S. 181, 197)

**Petitioner Has Not Shown the Existence of Bias in the State Grand Jury Proceedings.**

Assuming arguendo that petitioner's rights under the due process clause would be violated if bias on the part of one or more of the grand jurors was found to exist, petitioner has not shown such to be the fact in the instant case. The gist if the petitioner's argument is

that standards applied to petit jurors must be applied to grand jurors to determine this question. By that standard, petitioner has the burden of showing bias, not as a mere opportunity for it to exist, but as a demonstrable reality. *United States v. Handy,* 351 U.S. 454, 462.

The only thing in the record to indicate bias at the time of impanelment of the grand jury is the compilation of news coverage at R. 507-589, and the impanelment of the grand jury at R. 312-332. The compilation of news coverage certainly can do no more than establish a "mere opportunity" for bias. An examination of the record of the impanelment of the grand jury reveals that those proceedings were well calculated to secure jurors who would act fairly. It is not disputed that the specific directions of the grand jury statutes were followed.

As a result of Senate hearings in the early part of 1957, the Washington State Bar Association requested King County Superior Court Judges to call the grand jury (R. 593). As announced in the newspapers (R. 536) on May 3, 1957, the grand jury was called for the specific purpose of investigating the possible misuse of Teamsters Union funds by petitioner and one Frank Brewster. Calling a grand jury for a specific purpose is established procedure in the State of Washington as indicated in: *Blanton v. State,* 1 Wash. 265, 270; *State v. Krug,* 12 Wash. 288, 290; *State v. Heaton,* 21 Wash. 59, 60; *State v. Guthrie,* 185 Wash. 464, 476.

Because of the specific purpose for which the grand jury was called, the trial judge gave a brief objective

explanation to the grand jury of the nature of the inquiry they should conduct and the broad applications of law which required it (R. 329-330, pp. 3 to 8 above).

The trial judge admonished the jurors twice to determine the truth *or falsity* of the allegations (R. 329-330) and swore them to:

> ". . . present no person through envy, hatred, or malice; neither will you leave any person unpresented through fear, favor, affection, or reward or the hope thereof; but that you will present things truly as they come to your knowledge, according to the best of your understanding, and according to the laws of this state." (RCW 10.28.050)

There is nothing in the record to show that the grand jurors violated their oath. The procedure followed is tantamount to an indictment formally laid before them for their consideration and certainly is not prejudicial to the person or persons under inquiry. Petitioner claims this prejudiced the jury toward him relying on the following cases cited at page 62 of petitioner's brief:

*Fuller v. State,* 85 Miss. 199, 37 So. 749 (1905); *Blake v. State,* 54 Okla. 52, 14 P.(2d) 240 (1932); *Clair v. State,* 40 Neb. 534, 59 N.W. 118 (1894); and *State v. Will,* 97 Iowa 58, 65 N.W. 1010 (1896) (App. Br. 49-50). These cases are not apposite.

In *Fuller v. State,* 85 Miss. 199, 37 So. 749 (1905), the court reversed a conviction upon indictment for unlawfully selling liquor, holding that it was error for the trial court to say to the grand jury in his charge "Have you ever heard of Charlie Fuller?" [the defendant] because, in context, it was tantamount to a

direction to indict; and for the court to say in the presence of the petit jurors in overruling a motion for continuance "There has been much complaint over the state about the failure to convict these criminals . . ." and that the court feared "much was due to the application of a defendant's lawyers for continuance and the disposition of the courts to indulge it, and the lack of speedy trials."

In *Blake v. State,* 54 Okla. Cr. 62, 14 P.(2d) 240 (1932), the court reversed a conviction upon an indictment for destroying public records where in its charge to the grand jury, the court referred several times to the defendant by name and where the grand jury was coerced into returning the indictment by discharge of one grand jury which returned no indictment and reimpaneling the grand jury, and the court sustained a challenge by the state to persons who had voted against the indictment in the previous proceeding.

In *Clair v. State,* 40 Neb. 534, 59 N.W. 118 (1894), the court reversed an adjudication of contempt. The trial court had held the defendant in contempt for filing a motion to quash an indictment returned against his client on the ground, *inter alia,* of inflammatory remarks by the judge in his charge to the jury. The court held that the criticism was merited where the court in its charge to the jury directed its attention to the specific charge of bribery, stated that it was the grand jurors' duty to indict therefor, and concluded "there comes up from the people a command for a forward march all along the line of your duty. You should give heed to that cry, for it comes from a patient and long-suffering endurance which has at last reached its limit."

In the instant case, the State prosecuting attorneys attended the grand jury proceedings as required by law (RCW 10.28.070) for the purpose of assisting the grand jury in its investigation. They were not conducting a trial. Their duty, among other things, was to interrogate witnesses to learn of offenses committed in the County. As to the propriety of the type of questioning complained of, the trial court (prior to reading the testimony) observed as follows:

> "Now my notion on this thing before us now is that someone, a prosecutor or deputy prosecutor, said to a witness, 'Why, nobody believes you. Can't you tell that we all know you are lying?'—my notion is that this sort of a statement is one which has occurred before practically every Grand Jury held in this county that I have ever heard about and that it is not only the right but perhaps the duty of the prosecutor to attempt to elicit whatever information is available by being a little harsh with witnesses whom he believes are falsifying." (R 825)

In fact, the questioning of the witness was very harsh. The nature of the witness's testimony is set out in respondent's statement of the case above. As there indicated, it was full of inconsistencies, evasions, and loss of memory.

The same witness, three weeks before, had been questioned closely as to whether the union had ever received money from sale of its cars as reflected by the books (R. 349-377). As it developed, this testimony was very damaging to petitioner. Then the witness came back after the three-week interval and said he had $6,600.00 from car sales which had been in his posses-

sion all of the time and which he had been using regularly and had completely forgotten about when questioned closely about this matter three weeks earlier (R. 378-487). In short, "It was patently a defense that could be contrived to meet the exigencies of the case" (R. 829). Under these circumstances the investigators had a duty to question harshly. The trial court, after reading the testimony, found that the conduct of the prosecutors did not affect the testimony of the witness and concluded that no rights of the petitioner were violated. His opinion is set out at R. 673-675. The trial court's conclusion of State law was upheld by four of the State's Supreme Court Judges with four disagreeing. Hence, the question of whether this conclusion of State law is error is still undecided. The answer to this question is immaterial to the application of the due process clause of the United States Constitution to the instant case for the reason that the due process clause only applies to the trial on the merits. (See *Paterno v. Lyons,* 334 U.S. 314; *Frisbie v. Collins,* 342 U.S. 519; and *Stroble v. California,* 343 U.S. 181.

Petitioner contends the State prosecuting attorneys' conduct before the grand jury was prejudicial, relying on the following cases; *United States v. Wells,* 163 Fed. 313 (D.C. Idaho, 1908); *Attorney General v. Pelletier,* 240 Mass. 264, 134 N.E. 407 (1922); *State v. Crowder,* 193 N.C. 130, 136 S.E. 337 (1927); and *People v. Benin,* 186 Misc. Rep. 548, 61 N.Y. Supp.(2d) 692 (1946). None of these cases are in point and all are clearly distinguishable.

In *United States v. Wells,* 163 Fed. 313 (D.C. Idaho

1908), the court quashed an indictment where after the evidence was taken, the district attorney, without the request of the grand jury, proceeded to argue his conclusions and directed the grand jury to return an indictment against the defendant, stating that he was acting under specific instructions from the Department of Justice at Washington; would not permit the grand jurors to discuss the case; and the next morning went into the grand jury room and refused to leave until the grand jury returned and signed the indictment. The court stated that this, in combination with the fact that one defendant was indicted without substantial evidence, gave rise to a presumption of prejudice. The court's findings were based upon affidavits of the grand jurors.

In *Attorney General v. Pelletier*, 240 Mass. 264, 134 N.E. 407 (1922) a proceeding by the attorney general to remove the district attorney from office, the court held that it was proper for the foreman and another member of the grand jury to testify concerning alleged misconduct of the district attorney before the grand jury. The court stated that where the district attorney, while the grand jury was deliberating, and before it voted, discussed the evidence before them, it was not within the requirement that the "Commonwealth Counsel" be kept secret, since it was not the "Commonwealth Counsel" within the meaning of the grand jury's oath.

In *State v. Crowder*, 193 N.C. 130, 136 S.E. 337 (1927), the court reversed a conviction for embezzlement. The court, after pointing out that the North

Carolina decisions "are to be classed among those which discountenance the custom of permitting the prosecuting attorney to attend the sessions of the grand jury" (at p. 338), stated that while the mere presence of the solicitor [the prosecuting attorney] in the grand jury room would hardly be sufficient cause for granting a plea in abatement, such a plea would be granted where the solicitor not only appeared in the grand jury room, but also explained the testimony to the grand jury and advised and procured their action in finding a true bill.

In *People v. Benin,* 186 Misc. Rep. 548, 61 N.Y.S.(2d) 692 (1946), the Court of General Sessions held that the defendant was entitled to inspect minutes of the grand jury since it was alleged and admitted that the district attorney had addressed the grand jury off the record and without the presence of the stenographer, the court being of the opinion that such statements, if given, should have been made in the presence of the grand jury stenographer and on the record.

In *Mooney v. Holohan,* 294 U.S. 103 (P. Br. 66), the prosecutors obtained conviction by presenting evidence they knew to be perjured.

*Berger v. U.S.*, 295 U.S. 78 (P. Br. 67) was a case of persistent misconduct by the prosecutor in a trial on the merits such as to affect the outcome.

*Eubanks v. Louisiana,* 356 U.S. 584 (P. Br. 67) was reversed because of racial discrimination in selecting the grand jury panel.

Petitioner, in pages 42-50 of his brief, apparently takes the position the authorities he cites therein support the proposition that persons not held to answer

prior to the impanelment of a Grand Jury have a right to conduct an *ex post facto voir dire* examination as to whether the grand jurors were biased. Authorities therein cited do no more than to allow such a person to challenge the Grand Jury for failure to comply with specific statutory requirements corresponding to RCW 10.28.010 and 2.36.070, which read as follows:

> "*10.28.010 Challenge to panel.* Challenges to the panel of grand jurors shall be allowed to any person in custody or held to answer for an offense, when the clerk has not drawn from the jury box the requisite number of ballots to constitute a grand jury, or when the drawing was not done in the presence of the proper officers; and such challenges shall be in writing and verified by affidavit and proved to the satisfaction of the court. [1891 c. 28 § 11; Code 1881 § 977; 1973 p. 220 § 263; 1854 p. 110 § 45; R.R.S. § 2025.]"
>
> "*2.36.070 Qualification of jurors.* No person shall be competent to serve as a juror in the superior courts of the state of Washington unless he be
>
> (1) an elector and taxpayer of the state,
>
> (2) a resident of the county in which he is called for service for more than one year preceding such time,
>
> (3) over twenty-one years of age,
>
> (4) in full possession of his faculties and of sound mind,
>
> (5) able to read and write the English language. [1911 c. 57 § 1; R.R.S. § 94. Prior: 1909 c. 73 § 1.]"

What petitioner fails to recognize in his argument is that he *was* allowed to interpose a challenge some three months after the indictment, but the grounds therefor were held insufficient.

Petitioner, at page 34 of his brief, claims that this entire grand larceny proceeding was an integral part of the Senate Committee's successful effort to destroy him as a public figure. It is submitted that whether or not this is true is immaterial to the question of whether petitioner received due process of law in his trial on the merits. If such was the motive of the Senate Committee, the efficacy of such a procedure is explained in *Delaney v. United States*, 199 F.(2d) 107 (1 Cir. 1952) as follows:

> "We limit our discussion to the case before us, and do not stop to consider what would be the effect of a public legislative hearing, causing damaging publicity relating to a public official not then under indictment. Such a situation may present important differences from the instant case. In such a situation the investigative function of Congress has its greatest utility; Congress is informing itself so that it may take appropriate legislative action; *it is informing the Executive so that existing laws may be enforced;* and *it is informing the public so that democratic processes may be brought to bear to correct any disclosed executive laxity.* Also, if as a result of such legislative hearing an indictment is eventually procured against the public official, then in the normal case there would be a much greater lapse of time between the publicity accompanying the public hearing and the trial of the subsequently indicted official than would be the case if the legislative hearing were held while the accused is awaiting trial on a pending indictment." (Emphasis supplied)

Also in this regard, the court below said:

> "The grand jury is now used not as a shield against the zealous prosecutor, as in times past,

but to replace, on occasion, the prosecutor who is not sufficiently zealous (for whatever reason), and, more often, as presently, as a valuable but expensive weapon (hence, used sparingly) to assist a prosecutor in investigating conditions and people insulated from investigation by the usual procedures. It has been said that,

"'The inquisitorial power of the grand jury is the most valuable function which it possesses to-day and, far more than any supposed protection which it gives to the accused, justifies its survival as an institution. As an engine of discovery against organized and far-reaching crime, it has no counterpart . . . .' *In re Grand Jury Proceedings*, 4 F. Supp. 283, 284 (E. D. Pa. 1933)." (56 Wn.(2d) 474, 476, (R. 830)).

At pages 68-69 and 95-96, petitioner asks why did not the prosecuting attorney dismiss the indictment and proceed by information so as to cure all the alleged errors in the grand jury proceedings. Also therein, petitioner compares the prosecuting attorney to Pontius Pilate and infers that the prosecutor could not believe "... in good faith as a reliable member of the bar that the evidence at his disposal warranted a prosecution ..." (R. 96). The answer to this is that, at the instance of the Board of Governors of the Washington State Bar Association, King County Superior Court Judges commenced the grand jury proceedings, not the prosecutor; that the evidence necessary for the prosecution was only available through the grand jury power of subpoena; and that when the indictment was returned there was nothing more to do to join the issues aside from petitioner's being arraigned. The motion to set

aside the indictment was not filed for over three months, the grounds cited therein were not well taken, and it matters not whether petitioner is charged under a document entitled "indictment" or "information." As to the prosecutor's role as Pontius Pilate, petitioner's position is inconsistent. On the one hand, petitioner accuses the prosecutor of exercising a partisan attitude so as to stampede the grand jury into bringing in the indictment. On the other hand, he infers that the prosecutor believes charges should not be brought at all. It is submitted that the motives or beliefs of the prosecutor are completely immaterial to the issue of whether petitioner was fairly convicted on the merits.

It is submitted that petitioner's argument at pages 59-62 of his brief, to the effect that it is prejudicial to seek to exclude from the grand jury those persons from the "class" under investigation, is frivolous.

At pages 69-75 and in the appendix of his brief, petitioner's argument relates to evidence adduced at the trial and affirmance by an equally divided court.

The matter of evidence adduced at the trial will not be argumed for the reason that it is not properly a part of the questions presented (R. 912-913), and for the further reason that that question is completely answered by four judges of the court below. *State v. Beck*, 56 Wn.(2d) 474, 494-496 (R. 848-850). The other four judges participating do not indicate any disagreement on this point.

The question of affirmance by an equally divided court was specifically excluded by the Order Allowing Certiorari (R. 911-913).

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the State court should be affirmed.

Respectfully submitted,

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